No. 21,930

United States Court of Appeals

For the Ninth Circuit

WILLIAM WARD EHLERT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

WELLS & CHESNEY,
2550 Telegraph Avenue,
Berkeley, California,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

Regulations

No. 21,930

United States Court of Appeals

For the Ninth Circuit

WILLIAM WARD EHLERT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant was indicted and convicted of a violation of 50 U.S.C. Appendix § 462 for refusing to submit to induction in the Armed Forces. (Clerk's Transcript, pp. 1-2.) The District Court had jurisdiction under 18 U.S.C. § 3231. The Court of Appeals has jurisdiction under 28 U.S.C. § 1291 and 28 U.S.C. § 1294.

STATEMENT OF THE CASE

On March 3, 1964, Appellant was classified 1-A by his Local Board. (Exhibit, p. 11.) On June 16, 1964, he was ordered to report for induction on July 14, 1965. (Exhibit, p. 18.) On July 13, he wrote his Local

Board requesting conscientious objector status, stating that he had been "unable to make a decision of such moment until faced with the absolute necessity to do so." (Exhibit, p. 18.) On July 14, Appellant reported to the bus depot to which he had been ordered but refused to leave for induction, stating that he was in the process of becoming a conscientious objector. (Exhibit, p. 22.) He was referred to the assistant clerk of his Local Board who gave him an SSS Form No. 150, Special Form for Conscientious Objector. (Exhibit, p. 22.)

Appellant submitted his SSS 150 to the Board on July 26. (Exhibit, pp. 25-28.) The form contained the following information regarding religious training and belief:

> Question 2: Describe the nature of your belief . . .
>
> Answer: I believe that service in the armed forces of this country at this time is work toward the end of the destruction of the human race. I consider that my duty not to work for the destruction of the human race is superior to any duty which may arise from any human relation.
>
> Question 3: Explain how, when and from whom or from what source you received the training and acquired the belief which is the basis of your claim . . .
>
> Answer: The time period is from September, 1960, to the present. The source and the method have been the intellectual atmosphere of the University of California and its surroundings and the natural workings of an eager to know and questioning mind.

Question 4: Give the name . . . of the individual upon whom you rely most for religious guidance.

Answer: No individual more than any other.

Question 5: Under what circumstances, if any, do you believe in the use of force?

Answer: Under any circumstances in which the use of force would not make more probable the destruction of the human race.

Question 6: Describe the actions and behavior . . .

Answer: I do not believe I have any convictions which could be called religious in the sense that term is used today; that is, based upon a mythical explanation for the creation of the universe and life; requiring regular observance of ritual; acceptance of "men of the cloth" as, *per se,* superior moral and spiritual guides; and intolerance of those professing other religions.

Question 7: Have you ever given public expression . . .

Answer: No.

In addition, Appellant submitted to the Board a letter stating that

> Because of conscientiously-held beliefs which I do not consider religious in nature, I shall decline to serve in the Armed Forces. (Exhibit, p. 24.)

However, it is clear that by "religious", Appellant meant only belief based on

> a mythical explanation for the creation of the universe and life; requiring regular observance of ritual; acceptance of "men of the cloth" as,

per se, superior moral and spiritual guides; and intolerance of those professing other religions. (Exhibit, p. 26.)

On January 19, 1966, the Local Board informed Appellant that it declined to reopen his classification. (Exhibit, p. 36.) Appellant was ordered to report for induction on February 9, 1966 under authority of the induction order of June 16, 1965. (Exhibit, p. 43.)

On December 14, 1966, an indictment was filed charging Appellant with a violation of 50 U.S.C. Appendix § 462, Refusal to Submit to Induction. (C.T. p. 1.) Appellant was tried by the Court on March 29, 1967, found guilty, and on May 31, sentenced to two years imprisonment. (C.T. p. 31.)

The District Court held, inter alia, that there was no basis in fact for the Board's determination that there was no change in status beyond Appellant's control, but, following *Parrott v. U.S.,* 370 F.2d 388 (1966), held that, as a matter of law, changes in status involving conscientious objection were not beyond the control of the registrant.

SPECIFICATIONS OF ERROR

The District Court erred in holding that a factual change in status to that of conscientious objector was not legally a change in status beyond a registrant's control, within the meaning of Selective Service Regulation 1625.2, and that therefore Appellant was not denied due process by failure of the draft board to reopen and reconsider his claim for conscientious

objector status submitted after receipt of his Order to Report for Induction.

ARGUMENT

I

THE PROVISION OF SELECTIVE SERVICE REGULATION 1625.2 THAT A CLASSIFICATION MAY BE REOPENED EVEN AFTER AN ORDER TO REPORT FOR INDUCTION HAS BEEN MAILED IF A CHANGE IN A REGISTRANT'S STATUS OCCURS DUE TO CIRCUMSTANCES BEYOND A REGISTRANT'S CONTROL APPLIES TO THOSE REGISTRANTS WHO UNDERGO A CHANGE IN STATUS TO THAT OF CONSCIENTIOUS OBJECTOR DUE TO CIRCUMSTANCES BEYOND THEIR CONTROL.

Section 6(j) of the Universal Military Training and Service Act, codified as 50 U.S.C. Appendix § 456 (j) provides in part that,

> Nothing contained in this title [the Act] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

At the time of the commission of the offense for which Appellant was convicted, Section 456(j) provided an elaborate procedure for the determination of whether a registrant qualified as a conscientious objector. First, the local board reviewed the matter. If the local board denied the classification, a registrant was allowed an appeal, the Department of Justice conducted an investigation of his qualifications, and he was afforded a Department of Justice hearing.

Although the procedure for dealing with conscientious objection claims was set forth in the statute in some detail, no provision of the subsection required that claims for such status be made within a particular time, or before the happening of a particular event, such as receipt of an Order to Report for Induction.

As all details of the Selective Service System were not worked out by Congress, authority was delegated to the President to prescribe necessary rules and regulations to carry out the provisions of the Act. 50 U.S.C. Appendix § 460(b)(1). Pursuant to that authority, regulations were passed, inter alia, to provide review and reclassification by local boards when a change in circumstances indicated that a change in classification was appropriate. Selective Service Regulations 1625.1-1625.14.

Selective Service Regulations 1625.1 and 1625.2 provide for reopening and reconsideration after receipt of facts which might result in a different classification. The local board may reopen upon any set of facts, except that after an Order to Report for Induction has been mailed to a registrant, his classification cannot be reopened unless there has been a change in his status resulting from circumstances over which he had no control.

The wording of the two regulations makes it apparent that they were designed to include situations involving conscientious objector status. Regulation 1625.1(b) provides, in part, that

> Each classified registrant . . . shall . . . report to the local board in writing *any fact* that might result in the registrant being placed in a different classification such as, *but not limited to,* any change in his occupational, marital, military, or dependency status, or in his physical condition. (Emphasis added.)

Regulation 1625.2 provides, so far as is relevant here, that

> the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.

Neither of the above regulations exclude facts and circumstances bearing on conscientious objector classification from the spectrum of circumstances which may be beyond a registrant's control.

To hold that conscientious objector claims are not within the proviso of Regulation 1625.2 would subvert the apparent thrust of the Universal Military Training and Service Act, for Section 456(j) sets forth a strong policy of deferment for conscientious objectors. To exclude conscientious objector claims from the proviso of Regulation 1625.2 might result in a conscientious objector having to perform combatant training and service. The first sentence of Section 456(j) specifically forbids such a construction.

Further, an exclusionary construction would result in a lack of uniformity of treatment of conscientious

objector claims. Claims may now be submitted before an Order to Report for Induction is mailed, Regulation 1625.1-1625.14. Claims may be submitted after induction. See Dept. of Defense Directive No. 1300.6 ASD(M) (August 21, 1926); Army Reg. No. 635-20 (Nov. 9, 1962); Dept. of the Navy, Bupers Instr. 1616.6 (Nov. 15, 1962); Marine Corps Order 1306.16A (Oct. 16, 1962); Air Force Reg. No. 35-24 (March 8, 1963). The armed services, however, will not consider a claim for exemption which matured prior to induction. Dept. of Defense Directive No. 1300.6. Thus, if such claims can never be asserted before the local board after an Order to Report has been sent, one who has a valid claim maturing during that time would have no remedy. This would be contrary to the "strong congressional policy to afford meticulous procedural protections to applicants who claim to be conscientious objectors . . ." *U.S. v. Gearey,* 368 F.2d 144 (1966).

The Second Circuit, in *U.S. v. Gearey,* supra, recently adopted the position urged by Appellant here: that the proviso of 1625.2 applies to conscientious objection claims maturing after receipt of an induction notice. However, language in *Parrott v. U.S.,* 370 F. 2d 388 (1966) indicates a rejection by this circuit of the Second Circuit's position in *Gearey.* The District Court held that *Gearey* was not the law of this circuit and felt constrained to follow *Parrott,* resulting in Appellant's conviction. It is Appellant's view, however, discussed in the following section, that *Gearey* and *Parrott* are not in conflict.

II

THE QUESTION OF WHETHER A PARTICULAR CHANGE IN STATUS IS DUE TO CIRCUMSTANCES BEYOND A REGISTRANT'S CONTROL IS A FACTUAL ISSUE TO BE DECIDED ON A CASE BY CASE BASIS.

U.S. v. Gearey, supra, does not hold that in all cases the assertion of conscientious objection maturing after an induction notice entitles a registrant to reconsideration and the right to a full appeal procedure. *Gearey* merely holds that the proviso of Regulation 1625.2 includes conscientious objector claims maturing after notice of induction. The Selective Service System is still charged with the obligation of making the factual determinations of when the claim matured, whether a change in status has occurred, and whether the change is from circumstances beyond control of the registrant. In fact, the Second Circuit remanded Gearey's case for just such a factual determination.

It is Appellant's belief that this Circuit, in *Parrott v. U.S.,* supra, did not reject the *Gearey* holding but merely held it inapplicable to the facts before them at that time.

In *Parrott,* appellant Lawrence had received an induction notice during the spring of the school year and had asked for a postponement until the end of the semester, which was granted by his board. Thereafter, Lawrence contended that he was a conscientious objector, testifying that his religious views did not "crystalize" until sometime in June.

The Court rejected Lawrence's *Gearey* claim as having no foundation as to maturing date in the record:

> "When his religious views might have crystalized is a matter of doubt and pure speculation." *Id.* at 396.

Further, it seems apparent that this Court only intended to reject a blind acceptance of a hard and fast rule. The Court's statement that "We do not approve of the 'crystalizing' theory, unless that crystalization was the only evidence before the board", *Id.* at 396, appears to be another way of asserting that the Court accepted the *Gearey* holding, but would limit it to cases where there was no basis in fact for the board's refusal to reopen, resulting in a denial of due process.

The construction and interpretation urged by Appellant would leave to the local boards the factual determinations required by *Gearey,* while reaffirming the long standing rule that actions by local boards, including refusal to reopen, are subject to limited review by the courts applying the "no basis in fact" test. *U.S. v. Majher,* 250 F. Supp. 106 (1966, D.C. W.Va.); *U.S. v. Ransom,* 223 F.2d 15 (1955, 7 C.A.).

III

APPELLANT WAS DENIED DUE PROCESS BY THE FAILURE OF HIS LOCAL BOARD TO REOPEN HIS CASE WHEN IT HAD NO BASIS IN FACT FOR REFUSING TO DO SO.

The District Court indicated, by its statement that it would acquit were it within the Second Circuit, that it could find no basis in fact for the board's refusal to reopen. This is supported by the record.

Appellant stated explicitly to the board (Exhibit, p. 18), that he was unable to make his decision until he absolutely had to. His SSS Form 150 reflects that he had not been planning his move for a long time; the document is not the long, well articulated statement usually submitted in support of such a claim. His use of the term "religious" to refer to organized religions reflects a lack of counseling and legal assistance, Cf. *U.S. v. Seeger,* 380 U.S. 163, 85 S.Ct. 850, 13 L.ed. 2d 833 (1965). The totality of information before the board indicates a recent spontaneous decision precipitated by the receipt of the induction notice.

The question of whether the board erred in refusing to reopen should not be confused with the question of whether or not Appellant is, in fact, entitled to conscientious objector status. That question would be one to be decided upon reconsideration after reopening. The Board would be able to call Appellant in and question him and could check his references and background. Thus, it could well inform itself with a view towards making the type of in-depth determination clearly anticipated by Section 456(j) and the Regulations. But the Board did not avail themselves of these opportunities. It merely refused to reopen. On this record, that action was without merit.

Should this Court agree with Appellant and reverse, Appellant will not be exempted from the draft laws. There will be further proceedings to determine if Appellant qualifies as a conscientious objector. If he does not, he will be obligated to serve in combatant

service. If he is, he will do alternative service. In either case, a more informed, better-reasoned decision will have been reached.

CONCLUSION

For the foregoing reasons, Appellant urges the Court to reverse his conviction.

Respectfully submitted,
WELLS & CHESNEY,
ARTHUR WELLS, JR.,
Attorneys for Appellant.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the U. S. Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ARTHUR WELLS, JR.

(Appendix Follows)

Appendix

Appendix

Exhibit	Record Ref.
No. 1 (Appellant's SS File)	9